REASONS FOR GRANTING THE WRIT

I. THE SUBJECTIVE "MEANINGFUL BENEFIT" STANDARD ADOPTED BY THE COURT OF APPEALS DEVIATES FROM *ROWLEY* AND CREATES UNCERTAINTY FOR STATE AND SCHOOL DISTRICT PERSONNEL

The heart of IDEA is its requirement that school district officials develop, for each student with a disability, an IEP designed to provide the student with a free appropriate public education (FAPE). 20 U.S.C. 1412(a). *See, e.g., Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 518-19 (D.C. Cir. 2005); *Missouri Dep't of Elementary & Secondary Educ. v. Springfield R-12*, 358 F.3d 992, 998 (8th Cir. 2004); *Maine Sch. Admin. Dist. No. 35 v. Mr. R.*, 321 F.3d 9, 11-12 (1st Cir. 2003). In *Rowley*, this Court held that a State provides FAPE by "providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." 458 U.S. at 203. The Act requires "that the education to which access is provided be sufficient to confer *some* educational benefit upon the handicapped child." *Id.* at 200 (emphasis added). *Rowley's* "some educational benefit" standard establishes a clear, objective standard that has been recognized and faithfully applied by a majority of the courts of appeals. Pet. 11-12. This standard requires reviewing ALJs and courts to make an objective and clear-cut determination as to whether an IEP is designed to provide *some* educational benefit.

The "meaningful benefit" standard adopted by the Sixth Circuit below and a minority of the courts of appeals, by contrast, establishes an inherently subjective standard. *See, e.g., Shore Reg. High Sch. Bd. of Educ. v. P.S. ex rel. P.S.*, 381 F.3d 194, 198 (3d Cir. 2004); *Adam J. ex rel. Robert J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 808-809 (5th Cir. 2003); *Adams v. Oregon*, 195 F.3d 1141, 1149-1150 (9th Cir. 1999). There are no clear guideposts for federal courts in determining whether an IEP provides a "*meaningful*," as opposed to "*some*," benefit. A standard that requires

determination of whether the benefit provided is "meaningful" can do nothing other than send reviewing ALJs and federal courts on a subjective quest for whether the benefit provided by an IEP is "meaningful," without any guidance for the point at which the standard is met.

The lack of any ascertainable standard for what is a "meaningful benefit" creates uncertainty for the school district personnel responsible for developing an IEP. Moreover, it will require federal courts to make complex, value-laden judgments about the effectiveness or desirability of educational techniques that may be the product of different schools of thought and subject to ongoing debate among educational and medical professionals. As this Court recognized in *Rowley*, however, "courts lack the 'specialized knowledge and experience' necessary to resolve 'persistent and difficult questions of education policy.'" 458 U.S. at 208 (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973)).

There also is no reason for courts to second-guess the determinations of school districts and states by applying a subjective "meaningful benefit" standard when Congress has already provided extensive protections for students with disabilities. To ensure that disabled students are provided with FAPE, Congress required school districts and parents together to develop a rigorous and individualized education plan for each student. *See* 20 U.S.C. § 1414(d). These IEPs are highly specific. For example, each IEP must set forth accountability measures, including annual and short-term objectives, to make sure that the school districts are meeting the students' needs. *Id.* § 1414(d)(1)(A)(ii). Not only must school districts closely track the progress of each student toward meeting the goals set forth in their IEPs, but the districts also must keep parents apprised of their child's progress. *Id.* § 1414(d)(1)(A)(viii). The IEP also specifies exactly what special education and related services each student will receive. *Id.* § 1414(d)(1)(A)(iii). By following these requirements under IDEA, school districts across the

country are providing significant benefits to students with disabilities and being held accountable if they do not.[2]

A "meaningful benefit" standard can only be expected to encourage litigation by parents who are dissatisfied with an IEP and are willing to take the chance that an ALJ or district court on review will determine that the educational benefit provided by an IEP is not "meaningful." In contrast to an objective, "some benefit" standard, a subjective "meaningful benefit" standard may encourage parents to pursue IDEA litigation in the hopes that they will eventually obtain a federal judge who agrees that a particular educational program is more desirable than another program, even if both programs provide objective educational benefits to a disabled child.

To the extent litigation is encouraged by the "meaningful benefit" standard, it will only serve to put further pressure on already scarce educational resources. In the 1999-2000 school year, school districts spent an estimated $146.5 million on special education mediation, due process, and litigation activities. Special Education Expenditure Project, Am. Inst. of Research, What Are We Spending on Procedural Safeguards in Special Education, 1999-2000? 5 (May 2003). Of course, resources school districts are required to expend in litigating questions under the Act are not available for providing educational services to students.

The importance of adhering to *Rowley's* objective standard for determining whether an IEP is designed to provide FAPE is heightened in the context presented by this case—providing special education services to a child who has autism. The increasing prevalence of children diagnosed with autism, the ongoing debate over effective educational methods to serve children with autism, and the cost of providing those services all provide an important backdrop for the issues presented by this case.

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[2] These requirements are long standing and were unchanged by the Individuals with Disabilities Education Improvement Act of 2004.

The number of children served under IDEA who have been diagnosed with autism has increased exponentially over the last ten to fifteen years. United States Department of Education, Number of Children Served in the 50 States and D.C. under IDEA, Part B, Age 6-21: By Age Group and Disability 1990 through 2003 (reporting that the number of individuals with autism aged 6 to 21 in the United States increased from about 5000 in 1991 to over 140,000 in 2003).[3] The causes and significance of the increase in the prevalence of autism are in dispute among medical professionals.[4] Nevertheless, the in-classroom reality remains that educators and school systems are faced with rapidly growing numbers of students classified as autistic who require special educational services.[5]

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[3] Critiques of the Department of Education's data tracking methods for the autism prevalence rate have surfaced recently, reflecting the larger debate within the scientific community about the causes and significance of this trend. *See, e.g.*, James R. Laidler, *US Department of Education Data on 'Autism' are not Reliable for Tracking Autism Prevalence*, 116 Pediatrics 1, e120-e124 (July 1, 2005) (suggesting that the increased autism prevalence rate is related more to differences in definitions used to classify a child as autistic for IDEA purposes in different states than an actual increase in autism prevalence).

[4] *Compare* Laidler, *supra*, with Mark F. Blaxill, *What's Going On? The Question of Time Trends in Autism*, 119 PUB. HEALTH REP. 536, 549 (2004) (arguing that although at least a portion of the higher autism prevalence rate is likely due to definitional variations over time and an increased awareness of the disorder, there is "little evidence that systematic changes in survey methods can explain these increases [in autism prevalence rates], although better ascertainment may still account for part of the observed changes").

[5] Individual states have been affected to different degrees by this trend. For example, a study commissioned by the California state legislature reported a 272.93 percent increase in the number of autistic individuals registered with the California developmental center system from 1987 to 1998. California Health and Human Services Agency, Changes in the Population of Persons with Autism and Pervasive Developmental Disorders in California's Developmental Services System: 1987 through 1998 6, 8 (Mar. 1, 1999).

The cost of providing special education services for this rapidly growing population of autistic, and other, children with disabilities, falls primarily upon state and local governments. Although the federal government has committed to providing up to 40 percent of the extra costs imposed on states by IDEA, 20 U.S.C. § 1411(a)(2)(B), in reality appropriations have fallen far short of that expectation. In 2002, for example, the federal budget covered only 18 percent of the additional costs of providing special education.[6] The average per-pupil expenditure for a special education student is nearly twice that of other students, and in 2000 special education accounted for nearly 22 percent of nationwide spending on education although only 11 percent of students receive special education services. *Id.* at ¶ 3. For children with autism, the costs are even higher. A report by the Center for Special Education Finance estimates that school systems spend on average $18,790 per student to provide instructional and related services to a student with autism. Jay G. Chambers et al., Center for Special Education Finance, *Total Expenditures for Students with Disabilities, 1999-2000: Spending Variation by Disability* 5 (Jun. 2003). Certain methods of therapy, such as the ABA method favored by the parents in this case,[7] can cost as much as $40,000 per child per year. Kristen Gerencher, *Parents Urged to Take Role in Early Treatment of Autism,* Thompson Fin. News, Feb. 24, 2005.

Educational experts debate which methods are most effective—*i.e.*, meaningful—for educating children who are autistic. *See LT* v. *Warwick Sch. Comm.*, 361 F.3d 80, 83

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[6] National Association of State Boards of Education, *Special Education Funding*, 10 NASBE Policy Update 12, ¶ 2.

[7] The Deals advocated for a program developed by the Center for Autism and Related Disorders (CARD). The ALJ found that "this program is patterned after a methodology for treating autistic children developed by Dr. Ivan Lovaas." Pet. App. 3a. The CARD program "consists of one-on-one applied behavioral analysis ("ABA") that relies heavily on extremely structured teaching and comprehensive data collection and analysis." *Id.*

(1st Cir. 2004) ("Autism is very difficult for parents, as well as teachers, to handle, and there are divergent theories as to the best treatment."); *Gill v. Columbia 93 Sch. Dist.*, 217 F.3d 1027, 1038 (8th Cir. 2000) ("autism experts have a variety of opinions about which type of program is best"); *Adams* v. *Oregon*, 195 F.3d 1141, 1149-1150 (9th Cir. 1999) ("there are many available programs which effectively help develop autistic children"); Pet. App. 58a (expert testimony in district court below that "there is no scientific consensus that any one method of treating autism is any better than another"). As recently amended, IDEA requires that an IEP be "based on peer-reviewed research to the extent practicable." 20 U.S.C. § 1414(d)(1)(A)(i)(IV). But the peer-reviewed literature reflects a lively debate concerning the educational benefits of both the ABA Lovaas-style program preferred by the parents in this case, and the TEACCH method on which the school district's program was largely based. Pet. App. 6a-7a & n.5.[8]

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[8] The research pertaining to the TEACCH method is summarized in Gary B. Mesibov, *Formal and Informal Measures on the Effectiveness of the TEACCH Programme*, 1 Autism 25 (1997) and, more recently, in Gary B. Mesibov, et al., The TEACCH Approach to Autism Spectrum Disorders (Kluwer Academic/Plenum Publishers 2005). For benefits of the Lovaas method, see Oscar I. Lovaas, *Behavioral Treatment and Normal Educational and Intellectual Functioning in Young Autistic Children*, 55 J. of Consulting and Clinical Psychol. 3 (1987); Oscar I. Lovaas & Tristran Smith, *A Comprehensive Behavioral Theory of Autistic Children: Paradigm for Research and Treatment*, 20 J. of Behav. Therapy and Experimental Psychiatry 17 (1989); John J. McEachin, et al., *Long-term Outcome for Children with Autism who Received Early Intensive Behavioral Treatment*, 97 Am. J. on Mental Retardation 359 (1993). The underlying approach for both methods relies on the same general philosophy: treatment is delivered for many hours per day and in several of the child's environments. *See* Laura Schreibman, *Intensive Behavioral/Psychoeducational Treatments for Autism: Research Needs and Future Directions*, 30 J. of Autism and Developmental Disorders 373, 374 (2000); Committtee on Educational Interventions for Children with Autism, Division of Behavioral and Social Sciences and Education, Educating Children with Autism 140-72 (2001).

In the face of these debates in the medical community and among education researchers, school district personnel across the country are every day developing and implementing IEPs to provide FAPE to students with autism. In doing so, they are applying their best educational judgment, based on constantly evolving educational and medical opinions and in the face of competing research and limited funds, and making individualized determinations about what treatment is most appropriate for each disabled child. The standard of review applied by federal courts in determining whether those IEPs are reasonably designed to provide FAPE can make a concrete difference in ultimately determining whether states and school educators are permitted to make the necessary educational decisions, or whether those decisions instead will be made by reviewing courts.

For example, in *LT* v. *Warwick School Committee*, 361 F.3d 80 (1st Cir. 2004), the First Circuit, using the "some educational benefit" standard, held that an IEP developed for an autistic child that was centered on the TEACCH method provided FAPE, rejecting the parents' contention that the child could only benefit from a Lovaas-style program. The Sixth Circuit reviewing the same IEP, based on the decision below, would likely find that the IEP failed to meet the "meaningful benefit" standard. The direct conflict that has developed among the courts of appeals—and that was deepened by the decision below—concerning whether FAPE should be evaluated based on a "some benefit" or a "meaningful benefit" standard is an important issue that requires this Court's review to create a uniform standard.

II. THE COURT OF APPEALS' PREDETERMINATION RULING RISKS DISCOURAGING SCHOOL DISTRICT PERSONNEL FROM THOROUGH PREPARATION PRIOR TO IEP TEAM MEETINGS

The court below also held that the school district had violated the procedural provisions of IDEA by "predetermining" not to provide ABA-style services to Zachary Deal, which "deprived Zachary's parents of

meaningful participation in the IEP process." Pet. App. 24a-25a. This ruling on "predetermination" threatens to discourage school district personnel from engaging in the thorough preparation and internal collaboration that promotes development of a well-considered draft IEP so that an IEP team meeting can be effective. The predetermination decision below is also of concern because it would allow parents to dictate the contents of an IEP simply by insisting that one—and only one—educational program was beneficial for their child.

Creating an IEP for each student with a disability is an important undertaking that requires substantial preparation and analysis by the school district. The IEP team is composed of at least a special education teacher, a regular education teacher, a school district official, and the parents. 20 U.S.C. § 1414(d)(1)(B). These team members have the often difficult task of developing a plan that includes measurable annual goals for the child and identifies the services that will help the child advance toward those goals. *Id.* § 1414(d)(1)(A)(i); *see also Rowley*, 458 U.S. at 182. In developing the plan, the IEP team must consider many factors, such as the results from the child's evaluation and the child's academic and developmental needs. *Id.* § 1414(d)(3).

Because each IEP is individualized to the student's needs, IEP team members must come to the table prepared to discuss the advantages and disadvantages of various placements and services for that child. Considering that the services that the IEP team members agree upon must be based on "peer-reviewed research to the extent practicable," *id.* § 1414(d)(1)(A)(i), it makes sense for the team members to have an understanding of the effectiveness of those various services and to what extent those services would benefit the child. *See* 30 CFR Pt. 300, App.A, No. 32 (2000) ("Agency staff may come to an IEP meeting prepared with evaluation findings and proposed recommendations regarding IEP content."). A less diligent or thorough approach would hamper the development of the IEP, create an inefficient administrative process, and increase the time and costs of

implementing IDEA. *See N.L. v. Knox County Schools,* 315 F.3d 688, 693 n.3 (6th Cir. 2003) ("[W]ithout some organization and evaluation prior to the IEP meeting, it is unclear how an IEP Team could make reasonable or informed decisions."); *see also Hanson* v. *Smith,* 212 F. Supp. 2d 474, 486 (D. Md. 2002) ("while a school system must not finalize its placement decision before an IEP meeting, it can and should have given some thought to that placement").

The dedication and commitment of local educational officials in working with parents to determine and implement IEPs for disabled children are manifest in this case. The district court found that during the two year period from 1997 into 1999, Hamilton County Department of Education (HCDE) teachers and administrators spent approximately 500 staff hours meeting with the Deals on a dozen or so occasions. Pet. App. 52a. The IEP developed by HCDE personnel for Zachary Deal for 1998-99 (when Zachary was four years old) spanned 95 pages and provided for, among other things, 35 hours per week of special education instruction, along with physical therapy and speech therapy. Pet. App. 3a-4a, 51a-52a.

If the decision below on predetermination were allowed to stand, however, school district personnel may be discouraged from the careful and thorough preparation that is necessary for a productive IEP meeting. This preparation requires application of the collective educational expertise and judgment of school district officials to the particular circumstances of the child. If school district officials are concerned that by doing this hard work and developing their collective judgment prior to an IEP meeting, they risk a procedural violation of IDEA, school district officials may be tempted to take the counterproductive position of coming to the IEP meeting "with a blank mind," *Doyle* v. *Arlington County Sch. Bd.*, 806 F. Supp. 1253, 1262 (E.D. Va. 1992), *aff'd,* 39 F.3d 1176 (4th Cir. 1994), in order to insulate themselves from a finding of predetermination.

At base, the predetermination decision is just another means of expressing the disagreement of the Sixth Circuit with the school district's determination of the educational methodology that should be employed to serve Zachary. According to the Sixth Circuit, the school district had "predetermined" Zachary's placement because its concerns about the efficacy of the ABA Lovaas-style methodology favored by Zachary's parents led it to a decision—using its best educational judgment—that the eclectic program it developed would provide Zachary with FAPE. Pet. App. 22a. This is nothing more than the court's disagreement with the school district's substantive educational policy judgment about which educational program was "meaningful," in the guise of a procedural violation of the Act.

The Sixth Circuit faulted the school district for predetermining Zachary's placement by considering the cost of the services requested by his parents. Pet. App. 39a. But, contrary to the implication of the court below, in developing an IEP, it is appropriate for school district officials to consider the cost of the services that may be provided, as long as the IEP provides FAPE. In IDEA, "Congress intended the states to balance the competing interests of economic necessity, on the one hand, and the special needs of a handicapped child, on the other, when making education placement decisions." *Barnett* v. *Fairfax County Sch. Bd.*, 927, F.2d 146, 154 (4th Cir. 1991). This Court has repeatedly concluded that cost may be taken into account in applying IDEA. *See Cedar Rapids Cmty. Sch. Dist.* v. *Garret F.*, 526 U.S. 66, 79 (1999) ("the potential financial burdens imposed on participating States may be relevant to arriving at a sensible construction of the IDEA") (citation omitted); *Irving Indep. Sch. Dist.* v. *Tatro*, 468 U.S. 883, 892 (1984). Indeed, school districts ultimately are responsible for marshalling their limited resources so as to maximize educational opportunities for *all* the children in their care, including those requiring special education services.

The Sixth Circuit's predetermination ruling also will invite litigation by encouraging parents to take hard-line positions that one and only one educational program is appropriate, or "meaningful" for their child, because if the school district rejects that approach—and the parents offer no other approach—the school district will be found to have committed a violation of IDEA. That is what happened here. The school district developed a draft IEP designed to offer a program deemed "eclectic" by the very nature of its inclusion of several different educational methods for autistic students. Pet. App. 7a & n.5. Zachary's parents, by contrast, insisted that the *only* service that would benefit Zachary was an ABA-style program in their home. Pet. App. 26a-27a. Thus by insisting on only one educational method, under the predetermination decision by the Sixth Circuit below, parents could foment a substantive IEP violation if the school district refuses to consider the program preferred by the parents—no matter how untested that program may be. *See generally Erickson* v. *Albuquerque Pub. Sch.*, 199 F.3d 1116, 1121 (10th Cir. 1999) (parents requesting horseback riding (hippotherapy) as related services in an IEP).

III. THE MEANINGFUL BENEFIT STANDARD AND PREDETERMINATION STANDARD ADOPTED BY THE COURT OF APPEALS CONTRAVENE PRINCIPLES OF FEDERALISM

The Sixth Circuit's "meaningful benefit" standard and predetermination ruling contravene the important federalism principles on which IDEA rests. IDEA is Spending Clause legislation, conditioning the receipt of federal funds on the state accepting the requirements of the Act. *See Rowley*, 458 U.S. at 190 n.11, 204 n.26; *see also Cedar Rapids*, 526 U.S. at 83-84 (Thomas, J., joined by Kennedy, J., dissenting) ("[b]ecause IDEA was enacted pursuant to Congress' spending power, our analysis of the statute in this case is governed by special rules of construction"). Because Spending Clause programs are in the nature of a "contract," "'if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.'" *Barnes* v.

Gorman, 536 U.S. 181, 186 (2002) (quoting *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981)). It cannot be said that Congress unambiguously imposed the "meaningful benefit" standard on the states. To the contrary, this Court in *Rowley* interpreted IDEA's FAPE guarantee only to require "some educational benefit." And Congress—which is presumed to be aware of this Court's decisions—has reauthorized IDEA against that backdrop.

The decision below undermines the federalism principles that undergird IDEA. The Sixth Circuit noted that the "implications" of its rationale for adopting that standard "might be that, where self-sufficiency is a realistic goal for a child, a program that *maximizes* the possibility of self-sufficiency could be required." Pet. App. 38a n.17 (emphasis added). As this Court held in *Rowley*, however, IDEA cannot require a "potential-maximizing education." 458 U.S. at 197 n.21. And *Rowley* similarly held that self-sufficiency could not be the substantive standard for determining FAPE. *Id.* at 201 n.23. In addition to being wrong, the court of appeals' observation that in its view the law may require FAPE to maximize the possibility of self-sufficiency would have stunning practical and financial consequences for *amici's* members. These consequences would greatly expand the obligations that States *knowingly* assumed when they accepted federal financial assistance under IDEA. *See Pennhurst*, 451 U.S. at 17 ("There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it").

As this Court explained in *Rowley*, "Congress' intention was not that the Act displace the primacy of States in the field of education, but that States receive funds to assist them in extending their educational systems to the handicapped." *Rowley*, 458 U.S. at 208. But that is precisely the effect of the "meaningful benefit" standard and the predetermination ruling below. Rather than allowing state and local educational officials to determine the appropriate educational methods for providing educational benefits to students with disabilities subject to certain objective federal standards,

these rulings invite federal courts to second-guess the decisions of local educational officials concerning the proper educational methodology for a particular child by creating a subjective standard for reviewing IEPs. Furthermore, they invite federal courts to determine that a school district has violated the procedural requirements of the Act simply because it disagrees with the educational method espoused by the parents, as long as the parents espouse only one method and fail to engage the school district on the terms of the method suggested by the school district.

Federalism concerns are particularly strong in the field of education—an area that traditionally has been reserved to the judgments of state and local administrators. *See United States* v. *Lopez*, 514 U.S. 549, 580-81 (1995) ("[I]t is well established that education is a traditional concern of the States."); *Board of Educ.* v. *Dowell*, 498 U.S. 237, 248 (1991) ("Local control over the education of children allows citizens to participate in decsionmaking, and allows innovation so that school programs can fit local needs.").

This Court cautioned in *Rowley* that "[i]n assuring that the requirements of the Act have been met, courts must be careful to avoid imposing their view of preferable educational methods upon the States." 458 U.S. at 207. The Court held that the district court had failed to heed that caution where, when presented with expert "evidence as to the best method for educating the deaf, a question long debated among scholars," it chose the method espoused by the parents' experts rather than by the school district. *Id.* at n.29. The same result follows here. There are competing theories as to the best method for educating students with autism, and there was competing evidence as to the method that would benefit Zachary Deal. This Court should grant review to adopt a uniform national standard that accords appropriate deference to the decisions of states and local educational officials in making these important educational decisions on a case-by-case basis.

Finally, it is important to recognize that consistent with these principles of federalism, IDEA leaves states free to

adopt a higher burden for establishing FAPE under state law, including a "meaningful education benefit" if states so desire. Indeed, IDEA's definition of FAPE explicitly recognized that states may adopt higher standards for FAPE and several states have done so. 20 U.S.C. § 1401(9)(B). Michigan and North Carolina, for example, have adopted a higher standard for FAPE than the standard encompassed by IDEA. *See Renner* v. *Board of Educ.*, 185 F.3d 635, 645 (6th Cir. 1999); *Cone* v. *Randolph County Schools*, 302 F. Supp. 2d 500, 509-510 (M.D.N.C. 2004), *aff'd*, 103 Fed. Appx. 731 (4th Cir. 2004), *cert. denied*, 125 S. Ct. 1077 (2005) (citing *Harrell* v. *Wilson County Sch.*, 293 S.E.2d 687, 690 (N.C. Ct. App. 1982)); *Burke County Bd. of Educ.* v. *Denton*, 895 F.2d 973, 983 (4th Cir. 1990). The Sixth Circuit below erred, however, in unilaterally imposing its own, heightened federal FAPE and predetermination standard on state and local education agencies within that circuit.[9]

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[9] In *Schaffer* v. *Weast*, 377 F.3d 449 (4th Cir. 2004), *cert. granted*, 125 S. Ct. 1300 (2005) (No. 04-698; to be argued October 5, 2005), this Court has granted certiorari to decide whether parents or school districts bear the burden of proof in an administrative hearing initiated by the parents challenging a child's IEP. Because the Court's decision in *Schaffer* may be instructive as to the federalism issues under IDEA raised in this case, it may be appropriate for the Court to hold the current petition pending resolution of *Schaffer*.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

Respectfully submitted,

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Supreme Court of the United States

HAMILTON COUNTY
DEPARTMENT OF EDUCATION,

Petitioner,

v.

MAUREEN DEAL; PHILLIP DEAL,
Parents on Behalf of Zachary Deal,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

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QUESTIONS PRESENTED

I. Whether the court of appeals erred in holding, based on a voluminous factual record and extensive findings by Tennessee, that Petitioner violated Respondents' statutory right to meaningfully participate in the development of their son's individual education plan by, among other things, predetermining the limits of that plan before meeting with Respondents, pursuant to Petitioner's policy, and then curtailing Respondents' ability even to ask questions of school officials.

II. Whether the court of appeals correctly remanded this case to the district court to determine whether Petitioner provided Zachary Deal, substantively, with a free appropriate public education under the Individuals with Disabilities Education Act in light of Zachary's individual needs and capabilities, including Zachary's capacity for progressing under the available educational services, and his ability to be educated in a mainstream educational setting with non-disabled peers.

PARTIES TO THE PROCEEDING

Petitioner is the Hamilton County, Tennessee, Department of Education.

Respondents are Maureen and Phillip Deal, for and on behalf of their son, Zachary Deal.

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BRIEF IN OPPOSITION

Respondents Maureen and Phillip Deal (the "Deals"), as parents of Zachary Deal, respectfully request that the Court deny the petition for writ of certiorari filed by Petitioner Hamilton County Department of Education.

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-42a, is reported at 392 F.3d 840 (6th Cir. 2004). The court of appeals denied rehearing *en banc*, Pet. App. 115a. That decision is unreported.

The opinion of the district court, Pet. App. 43a-62a, is reported at 259 F. Supp. 2d 687 (E.D. Tenn. 2003). The August 20, 2001 opinion and order of the Tennessee State Department of Education, Pet. App. 63a-114a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 6, 2004, and rehearing was denied on April 1, 2005. The petition for a writ of certiorari in No. 05-55 was docketed on July 7, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

INTRODUCTION

The Individuals With Disabilities Education Act ("IDEA") requires Petitioner to provide Zachary Deal, a child with autism, a free appropriate public education

("FAPE"). 20 U.S.C. § 1412(1). In this case, after thorough consideration of the district court's views, the detailed findings of an administrative law judge from Tennessee State's Department of Education ("Tennessee"), and a voluminous factual record, the court of appeals held that Petitioner failed to provide Zachary with a FAPE because Petitioner violated the statutorily mandated procedures for developing his individual education plan ("IEP"). 20 U.S.C. § 1415 *et seq.*

First, the court of appeals held that Petitioner violated IDEA by failing to provide the participation of a regular education teacher in the preparation of Zachary's IEP. Pet. App. 29a-32a. This holding alone required reversal of the district court and a remand for assessment of the Deals' claim for reimbursement as provided by the statute. Yet Petitioner does not challenge this ruling here.

Second, the court of appeals held that Petitioner violated IDEA by depriving the Deals of their right to meaningfully participate in the development of their son's IEP. Pet. App. 21a-29a. On the particular facts of this case, the Sixth Circuit concluded that Petitioner had predetermined Zachary's IEP before meeting with the Deals and, in a host of ways, precluded the Deals from having their dissenting views meaningfully considered. Pet. App. 26a-27a. In seeking review of this ruling, Petitioner badly misstates the holding of the court of appeals. The Sixth Circuit in no way held that local educational authorities must "bow to the unilateral dictates of parents" regarding a child's IEP. Pet. App. 19. To the contrary, the Sixth Circuit held only that Petitioner had "pre-selected" Zachary's IEP "regardless of Zachary's demonstrated individual needs" and that Petitioner was not open to modifying this pre-selected plan "no matter how strong the evidence

presented by the Deals." Pet. App. 21a, 27a. There is no cause for this Court to review this fact-bound assessment.

In addition, the court of appeals considered whether Petitioner also violated IDEA's substantive requirements. In this regard, the Sixth Circuit held that the district court failed to apply the proper standard in examining whether Petitioner's proposed IEP for Zachary substantively violated IDEA's requirement that he receive an individually tailored education sufficient to meet his specific needs. After meticulously parsing both the statute and this Court's decision in *Board of Educ. v. Rowley*, 458 U.S. 176 (1982), the court concluded that, while school districts are "clearly" not required to "maximize each child's potential" achievement, Pet. App. 33a-34a, their choice between educational plans must take some account of the individual potential of each child and the outcomes that might be achieved depending on what program is adopted. Pet. App. 34a. In Zachary's case, in particular, the court of appeals concluded that the district court had not taken sufficient account of Tennessee's findings with respect to Zachary's educational potential and remanded the case so that the district court could determine whether Petitioner's IEP for Zachary provided him with a "meaningful benefit" given his unusually high educational potential. Pet. App. 40a.

According to Petitioner, the Sixth Circuit's view that IDEA requires school districts to consider individual potential in designing IEPs and provide a "meaningful benefit" to individuals depending on circumstance, conflicts with the allegedly less stringent "some benefit" standard that other circuits have adopted. The purported circuit split, however, rests on semantics rather than substance. The "meaningful benefit" standard under the Sixth Circuit's